Tong Tai Holdings Sdn Bhd v Jimi ak Mantali & Ors

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24-378-2001-111(II)
ZAKARIA SAM JC
31 MARCH 2003

Civil Procedure *— Summary possession of land — Application for — Capacity of plaintiffs in bringing the action — Whether the action filed by the plaintiffs was on behalf of themselves and the other co-proprietors or just on behalf of the other co-proprietors — Whether the plaintiffs had locus standi in filing the action on behalf of the other co-proprietors — Rules of the High Court 1980 O 89*

The plaintiffs filed an application under O 15 r 12(1) of the Rules of the High Court 1980 ('the RHC') for the recovery of land under O 89 of the RHC. At the outset of the hearing of the application, the defendants raised three preliminary objections, inter alia, that O 89 r 3 of the RHC had not been complied with and that the alleged plaintiffs were not properly represented. The main issue facing the court was the capacity of the plaintiffs in bringing this action. Thus, the court had to determined: (i) whether the action filed by the plaintiffs was on behalf of themselves and the other co-proprietors or just on behalf of the other co-proprietors; and (ii) whether the plaintiffs had locus standi in filing this action on behalf of the other co-proprietors.

Held, upholding the defendants' preliminary objections and setting aside the originating summons with costs:

(1) Following *Duke of Bedford v Ellis* [1901] AC 1, the plaintiff in a representative action must state clearly in the summons and statement of claim that the action was taken up on behalf of themselves and on behalf of the others. It was not indicated anywhere in this originating summons that the plaintiffs brought this action on behalf of themselves as well as on behalf of the other co-proprietors. Thus, it was clear that the plaintiffs were not suing on behalf of themselves. The plaintiffs were not exercising their own right here. The plaintiffs were suing in their representative capacity, ie for the benefit of the other co-proprietors. In other words, the plaintiffs were merely acting on behalf of the other co-proprietors only. The capacity upon which the plaintiffs were suing was not clearly stated in this action (see p 454A–D); *Duke of Bedford v Ellis* [1901] AC 1 followed.

(2) The affidavit of the chairman of the plaintiffs, in support of this application, did not reveal either he or the plaintiffs had been duly appointed to commence this action, as a representative for and on behalf of all other registered co-proprietors. There was also no evidence adduced to show that no letters of administration had been obtained or warrant to act or consent given to the plaintiffs to commence this action on behalf of the estate of the late Tan Sri Ong. As such, the High Court found that the plaintiffs had no

proper authority to act for and on behalf of all other registered co-proprietors (see pp 454G–455A).

[Bahasa Malaysia summary

Plaintif-plaintif telah memfailkan satu permohonan di bawah A 15 k 12(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk pengembalian tanah di bawah A 89 KMT. Di permulaan perbicaraan permohonan ini, defendan-defendan telah menimbulkan tiga bantahan awal, antara lain, bahawa A 89 k 3 KMT tidak dipatuhi dan bahawa plaintif-plaintif yang dikatakan tidak direpresentasikan dengan betul. Persoalan utama yang dihadapkan ke mahkamah adalah tentang kapasiti plaintif-plaintif dalam memulakan tindakan ini. Oleh itu, mahkamah perlu menentukan: (i) sama ada tindakan ini telah difailkan oleh plaintif-plaintif bagi pihak mereka sendiri dan tuanpunya-tuanpunya bersama yang lain atau hanya bagi pihak tuanpunya-tuanpunya bersama yang lain; dan (ii) sama ada plaintif-plaintif mempunyai locus standi dalam memfailkan tindakan ini bagi pihak tuanpunya-tuanpunya bersama yang lain.

Diputuskan, mengekalkan bantahan awal defendan-defendan dan mengenepikan saman pemula dengan kos:

(1) Mengikut *Duke of Bedford v Ellis* [1901] AC 1, plaintif dalam satu kes representasi perlu menyatakan dengan jelas dalam saman dan pernyataan tuntutan bahawa tindakan telah diambil bagi pihak mereka sendiri dan bagi pihak yang lain. Ia tidak ditunjukkan di mana-mana dalam saman pemula ini bahawa plaintif-plaintif telah memulakan tindakan ini bagi pihak mereka sendiri dan juga bagi pihak tuanpunya-tuanpunya bersama yang lain. Oleh itu, ia adalah jelas bahawa plaintif-plaintif tidak menyaman bagi pihak mereka sendiri. Plaintif-plaintif tidak menggunakan hak mereka di sini. Plaintif-plaintif telah menyaman dalam kapasiti representasi mereka, iaitu untuk faedah tuanpunya-tuanpunya bersama yang lain. Dalam erti kata lain, plaintif-plaintif hanya bertindak bagi pihak tuanpunya-tuanpunya bersama yang lain sahaja. Kapasiti yang mana plaintif-plaintif hendak menyaman tidak dinyatakan dengan jelas dalam tindakan ini (lihat ms 454A–D); *Duke of Bedford v Ellis* [1901] AC 1 diikut.

(2) Afidavit pengerusi plaintif-plaintif, yang menyokong permohonan tersebut, tidak menunjukkan sama ada beliau atau plaintif-plaintif telah dilantik seperti sepatutnya untuk memulakan tindakan ini, sebagai seorang representasi untuk dan bagi pihak kesemua tuanpunya-tuanpunya bersama berdaftar yang lain. Tidak terdapat juga keterangan yang dikemukakan untuk menunjukkan bahawa surat pentadbiran telah diperolehi atau waran untuk bertindak atau persetujuan diberikan kepada plaintif-plaintif untuk memulakan tindakan ini bagi pihak harta pusaka si mati Tan Sri Ong. Oleh demikian, Mahkamah Tinggi mendapati

bahawa plaintif-plaintif tidak mempunyai kuasa yang betul untuk bertindak untuk dan bagi pihak kesemua tuanpunya-tuanpunya bersama berdaftar yang lain (lihat ms 454G–455A).]

Notes

For cases on application for summary possession of land, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 6238–6247.

Cases referred to

Duke of Bedford v Ellis [1901] AC 1 (folld)
Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors [1990] 3 MLJ 427 (refd)
& Co Ltd v Knight Steamship Co Ltd [1910] 2 KB 1021 (refd)
Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors [2001] 6 MLJ 241 (refd)
Palmco Holdings Bhd v Sakapp Commodities (M) Sdn Bhd & Ors [1988] 2 MLJ 624 (refd)
Voon Keng & Ors v Syarikat Muzwina Development Sdn Bhd [1990] 3 MLJ 61 (refd)
Smith & Ors v Cardiff Corp [1954] 1 QB 210 (refd)

Legislation referred to

Rules of the High Court 1980 O 6 r 3, O 15 r 12(1), O 89 r 3

John Shek (*John Shek & Co*) for the plaintiff.
Cheng Hui Hong (*See Chee How* with him) (*Cheng & Cheng*) for the defendants.

Zakaria Sam JC: This is an application filed by the plaintiffs under O 15 r 12(1) of the Rules of the High Court 1980 ('the RHC') for the recovery of land under O 89 of the RHC.

At the outset of the hearing of the application, the defendants raised three preliminary objections, namely:

(i) that O 89 r 3 of the RHC has not been complied with;

(ii) that the alleged plaintiffs are not properly represented herein;

(iii) that the affidavit filed in support by one Mr Hoan Siew Choo @ Fan Siew Choo (BICK 480209) dated 13 November 2001 is at the best merely supporting and representing the interest of M/s Tong Tai Holdings Sdn Bhd holding only 277/800ths undivided share in Lease of Crown Land No 1951 and 349/800ths undivided share in Lot 2170 Block 59 Muara Tuang Land District respectively.

The plaintiffs on the other hand, disputed to the mode of the defendants' objections which was done by way of preliminary objection. The plaintiffs contended that the merits of their case should be answered by the defendants through an affidavit-in-reply instead of by way of preliminary

objections. The plaintiffs urged the court to dismiss the preliminary objections as wrong procedure was adopted by the defendants.

On 28 March 2002, I allowed the defendants to proceed with the preliminary objections as the issues raised were issues of law and not facts. The defendants need not filed any affidavit in opposition if the issues raised in the preliminary objections could conclusively determine this action.

I shall now examine the defendants' objections.

Since the three preliminary objections are inter-related, I will consider all of them together.

The law

Representative action is provided under O 6 r 3 and O 15 r 12(1) of the RHC which reads:

> O 6 r 3:
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> (1) Before a writ is issued it must be indorsed —
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> (a) where the plaintiff sues in a representative capacity, with a statement of the capacity in which he sues;
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> (b) where a defendant is sued in a representative capacity, with a statement of the capacity in which he is sued.
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> (2) Before a writ is issued in an action brought by a plaintiff who in bringing it is acting by order or on behalf of a person resident outside the scheduled territories it must be indorsed with a statement of that fact and with the address of the person so resident.
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> O 15 r 12(1):
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> Where numerous persons have the same interest in any proceedings, not being such proceedings that are mentioned in r 13, the proceedings may be begun, and, unless the court otherwise orders, continued, by or against any or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this paragraph, the court appoints a person not named as a defendant, it shall make an order under r 6 adding that person as a defendant.

The law pertaining to representative action is well settled. In the case of *Duke of Bedford v Ellis* [1901] AC 1, it was held that in order to succeed in a representative action, the plaintiff must satisfy three requirements. Firstly, the plaintiff and those represented by it are members of a class and that these members have a common interest. Secondly, the plaintiff and those represented have a common grievance. Thirdly, the relief sought is in its nature beneficial to them all. This decision was followed with approval by our courts in *Palmco Holdings Bhd v Sakapp Commodities (M) Sdn Bhd & Ors* [1988] 2 MLJ 624 and *Voon Keng & Ors v Syarikat Muzwina Development Sdn Bhd* [1990] 3 MLJ 61, to name a few.

In *Duke of Bedford*, the plaintiffs had sued, on behalf of themselves and all other growers of fruits, flowers, etc. In *Smith & Ors v Cardiff Corp* [1954] 1 QB 210, the four tenants sued on their behalves and that of the other tenants that the increment of the rents was ultra vires. In *Markt & Co Ltd v*

Knight Steamship Co Ltd [1910] 2 KB 1021, the plaintiffs sued on behalf of themselves and 44 other persons, firms and companies who had shipped goods on board of a ship and both the ship and cargo were sunk. A

It is very clear, therefore, that besides fulfilling the three preconditions as stipulated in *Duke of Bedford*, the plaintiff in a representative action must state clearly in the summons and statement of claim that the action was taken up on behalf of themselves and on behalf of the others. B

It is not in dispute that the plaintiffs are one of the registered co-proprietors of the land. However, the main issue facing the court is the capacity of the plaintiffs in bringing this action. Is this action filed by the plaintiffs on behalf of themselves and the other co-proprietors or just on behalf of the other co-proprietors? To answer this question, one needs to look at the title in this originating summons. The plaintiffs herein are described as 'Tong Tai Holdings Sdn Bhd (in their representative capacity for the benefit of the other co-proprietors ...).' It was not indicated anywhere in this originating summons that the plaintiffs brought this action on behalf of themselves as well as on behalf of the other co-proprietors. Thus, it is clear that the plaintiffs are not suing on behalf of themselves. The plaintiffs are not exercising their own right here. The plaintiffs are suing in their representative capacity, ie for the benefit of the other co-proprietors. In other words, the plaintiffs are merely acting on behalf of the other co-proprietors only. C D

The learned counsel for the plaintiffs submitted that the action had been properly constituted under O 5 r 12(1) of the RHC and cited the cases of *Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors* [1990] 3 MLJ 427 and *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241 to support this argument. With due respect, the facts of these two cases do not support his proposition. In both cases, it must be noted that all the members of the alleged class have a common interest, ie that all have a common grievance and that the relief is in its nature beneficial to them all. Both the actions were brought on behalf of the plaintiffs and the others. E F

For the reasons as stated above, I must agree with the defendants' contention that the capacity upon which the plaintiffs are suing is not clearly stated in this action. G

The next question concerned the locus standi of the plaintiffs in filing this action on behalf of the other co-proprietors.

The affidavit of Mr Hoan Siew Choo @ Fan Siew Choo, the chairman of the plaintiffs, in support of this application, did not reveal either he or the plaintiffs had been duly appointed to commence this action, as a representative for and on behalf of all other registered co-proprietors (including the late Tan Sri Ong). H

There is also no evidence adduced to show that no letters of administration had been obtained or warrant to act or consent given to the plaintiffs to commence this action on behalf of the estate of the late Tan Sri Ong. I

A As such, I found that the plaintiffs have no proper authority to act for and on behalf of all other registered co-proprietors as well.

In the circumstances, the defendants' preliminary objections are upheld and the originating summons is hereby set aside with costs.

Defendants' preliminary objections upheld and originating summons set aside with
B *costs.*

Reported by Ezatul Zuria Azhari

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